STATE OF MICHIGAN

COURT OF APPEALS

TRACFONE WIRELESS, INC., Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,	UNPUBLISHED June 19, 2008
v	Nos. 275065; 275942 Court of Claims
DEPARTMENT OF TREASURY and EMERGENCY TELEPHONE SERVICE COMMITTEE, Defendants/Cross-Plaintiffs-Appellants/Cross-Appellees.	LC No. 06-000028-MZ

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

This appeal arises out of the trial court's orders holding that the provisions of the Emergency Telephone Service Enabling Act (ETSEA), MCL 484.1101 *et seq*, do not apply to providers of prepaid wireless cellular telephone services like plaintiff, but also holding that a portion of the fees plaintiff erroneously remitted pursuant to the ETSEA was not recoverable because it was outside the applicable limitations period, and awarding judgment in plaintiff's favor in the amount of $231,432.76.[1] We affirm in part and reverse in part.

Plaintiff is a provider of "commercial mobile radio services" (CMRS) in the form of prepaid, "pay as you go," wireless cellular telephones that are purchased "off the shelf" by consumers at various retail establishments. Plaintiff therefore does not invoice its customers or enter into monthly service contracts with them. In relevant part, the ETSEA requires CMRS providers and retailer to collect a monthly fee from their customers for "each CMRS connection that has a billing address in this state." MCL 484.1408(1). In the years 2000, 2001, 2002, and 2003, plaintiff remitted to defendants a total of $541,574.33 pursuant to that requirement. However, plaintiff contends that it paid its own funds and did so by accident. Plaintiff argues that because it does not have billing addresses or monthly bills for its customers, the 9-1-1 fee

[1] The trial court also granted summary disposition in plaintiff's favor on defendants' counterclaim, and defendants have not appealed that order.

does not apply, so it was not required to collect or remit the fees. When plaintiff discovered the mistake, it informed defendants that it wished the monies refunded. Plaintiff was ultimately informed that it could only obtain a refund by filing the instant suit in the Court of Claims, which plaintiff then did.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id*., 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*., 119-120. Likewise, under MCR 2.116(C)(9), all of the defendant's well-pleaded allegations are accepted as true, and summary disposition is appropriate only "when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002). Under MCR 2.116(C)(10), we consider all evidence submitted by the parties in the light most favorable to the non-moving party and grant summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, *supra* at 120.

This Court also reviews de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). The goal of statutory interpretation is to determine and give effect to the intent of the Legislature, with the presumption that unambiguous language should be enforced as written. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). If the language is unambiguous, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159-160; 645 NW2d 643 (2002). Equitable determinations are also reviewed de novo, although the factual findings underlying those determinations are reviewed for clear error. *Blackhawk Development Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

We first address defendants' contention that plaintiff lacks standing. "Whether a party has standing is a question of law that we review de novo." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612; 684 NW2d 800 (2004). In the absence of a particularized injury, no genuine case or controversy can exist between the parties, and therefore the courts lack any power to exercise over those parties. *Id*. Plaintiff must allege and prove that it did or will suffer some kind of actual harm as a consequence of defendants' conduct. *Id*., 629-631.

Defendants contend that plaintiff has failed to show actual harm because the plain language of the statute requires plaintiff to collect the applicable fees from its customers, not pay the fees itself. However, plaintiff has alleged that it paid the fees out of its own funds by accident, and it has submitted an interrogatory response stating that it did not collect the funds from its customers. The evidence in the record fails to show any indication to the contrary. Plaintiff's injury in fact is the loss of certain monies that plaintiff alleges it was not required to remit. Plaintiff has provided allegations and evidence tending to prove this injury, and defendant has not cast any doubt thereon. We therefore find that plaintiff has standing.

The primary issue in this case is whether, as a pure matter of law, the requirements of MCL 484.1408 apply to prepaid cellular telephone services. At the times relevant to this action,[2] the pertinent provisions of that statute provided as follows:

> (1) Until 2 years after the effective date of this section, a CMRS supplier or a reseller shall include a service charge of 55 cents per month for each CMRS connection that has a billing address in this state. Beginning 2 years after the effective date of this section, a CMRS supplier or a reseller shall include a service charge of 52 cents per month for each CMRS connection that has a billing address in this state. The CMRS supplier or reseller shall list the service charge as a separate line item on each bill. The service charge shall be listed on the bill as the "emergency 9-1-1 charge".
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> (6) A CMRS supplier or reseller shall implement the billing provisions of this section not later than 120 days after the effective date of this section.

The ETSEA further provides the following relevant definitions in MCL 484.1102:

> (c) "Commercial mobile radio service" or "CMRS" means commercial mobile radio service regulated under section 3 of title I and section 332 of title III of the communications act of 1934, chapter 652, 48 Stat. 1064, 47 USC 153 and 332, and the rules of the federal communications commission or provided under the wireless emergency service order. Commercial mobile radio service or CMRS includes [among other things, cellular telephone service].
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> (h) "CMRS connection" means each number assigned to a CMRS customer.
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> (x) "Person" means an individual, corporation, partnership, association, governmental entity, or any other legal entity.
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> * * *
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> (gg) "Service supplier" means a person providing a communication service to a service user in this state.

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[2] The supplied statutory language is the language as enacted in 1999 PA 78, which was the Public Act that added this section to the Emergency Telephone Service Enabling Act by 1999 PA 78. Subsection (1) underwent some minor changes, such as in wording, date references, and amount of money to be charged, but it has remained the same in substance. Subsection (6) was eventually renumbered, and a specific target date inserted, but again substantially unmodified. It is clear that none of the changes are material to the outcome of this appeal, and neither party suggests otherwise.

(hh) "Service user" means a person receiving a communication service.

Plaintiff asserts that it is not a "reseller," but by its own concession it is a "provider," so it is a "supplier" and potentially obligated to collect and remit the fees under MCL 484.1408(1). Significantly, the ETSEA does not define what constitutes a "billing address."

We find it irrelevant that plaintiff does not have a monthly billing cycle. The plain language of the statute requires the fees to be computed on a monthly basis, but not necessarily collected on a monthly basis. There is no inherent restriction on having only one bill, or having a billing cycle of either longer or shorter than one month. The plain language of the statute does mandate at least one "bill," but most importantly, it requires a "billing address."

The term "billing address" is not defined by the ETSEA, but a definition does exist in the Michigan Business Tax Act, MCL 208.1101 *et seq*. According to MCL 208.1261(a), "'[b]illing address' means the location indicated in the books and records of the financial institution on the first day of the tax year or on a later date in the tax year when the customer relationship began as the address where any notice, statement, or bill relating to a customer's account is mailed." This is consistent with the dictionary definition of "bill," which in relevant part means either "a statement of money owed for goods or services supplied" or "to send a list of charges to." Random House Webster's College Dictionary, 2001 ed. Given that bill*ing* is either a present participle or a gerund, "bill*ing* address" must refer to the *verb* form of "bill." We are persuaded that a "billing address" must in some way pertain to ongoing contact information for a customer. In particular, a "billing address" requires a *physical* location to which some kind of *written* information regarding an "account" could be delivered, and thereby relied on to be received, by a customer with some kind of ongoing relationship with the supplier.

Defendants contend that discovery would reveal that plaintiff's billing practices entail collection of extensive information from its customers, including customers' billing addresses. However, defendants admit that plaintiff "does not enter into monthly service contracts with its customers or invoice its customers." Because the meaning of "billing address" entails actually sending bills on an account to a customer, the fact that plaintiff might know where its customers live does not necessarily mean plaintiff has a "billing address" for those customers. In other words, there can be no billing address if there is no billing. Irrespective of what data plaintiff collects from its CMRS connection customers, if the CMRS connections do not have designated physical addresses for the purpose of receiving information about ongoing accounts, those CMRS connections do not have "billing addresses" within the meaning of MCL 484.1408. Because the CMRS connections in this case do not have "billing addresses," the 9-1-1 service charge need not be collected on them, as the trial court correctly found.

Nevertheless, the parties do not dispute that as a general matter, no Michigan governmental entity is authorized to refund taxes unless expressly permitted to do so by enactment of the Legislature, see *F.M. Sibley Lumber Co v Dep't of Revenue*, 311 Mich 654, 661; 19 NW2d 132 (1945), and the ETSEA does not expressly provide for a refund of plaintiff's tax payments here. However, plaintiff's refund claim is based on equity. "'It is a well settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.'" *Blanchard v Detroit*, 253 Mich 491, 495; 235

NW 230 (1931), quoting *Ward v Love Co*, 253 US 17, 24; 40 S Ct 419 (1920) and cases cited therein.

In *Spoon-Shacket v Oakland Co*, 356 Mich 151, 168; 97 NW2d 25 (1959), our Supreme Court upheld "the right of taxpayers to equitable relief from the unconscionable effect of crass mistakes of public officials in the field of taxation; mistakes gross enough to constitute fraud." More than sixty years previously, "[t]he right of a party, from whom has been exacted payment of rates of carriage in excess of those fixed by charter or statute, to recover the overcharge, [was] no longer open to serious question." *Pingree v Mut Gas Co*, 107 Mich 156, 158; 65 NW2d 6 (1895). However, the parties do not actually dispute that plaintiff would be entitled to a refund of any taxes or fees paid due to fraud or coercion by defendants. Rather, defendants contend that plaintiff's payments are not recoverable because they were voluntarily made, with full actual or constructive knowledge of the facts and applicable law.

Some of Michigan's earliest published cases regarded it as a settled, even presumptive, issue that voluntarily-paid monies were simply not recoverable. See *First Nat'l Bank v Watkins*, 21 Mich 483, 488-490 (1870); see also, generally, *Thompson v Detroit*, 114 Mich 502; 72 NW 320 (1897). At common law, actual duress was necessary for a payment to be considered involuntary. *General Discount Corp v Detroit*, 306 Mich 458, 465; 11 NW2d 203 (1943). But the rule evolved to permit recovery of unnecessary payments in the absence of duress and even without protest, if the payor made those payments "by reason of a mistake or ignorance of a material fact;" ignorance of a fact is equivalent to a mistake of fact, and either will make the payment effectively involuntary. *Pingree*, *supra* at 159-160. The same may be true even if the payor was negligent in failing to ascertain the true facts, "subject to the qualification that the payment cannot be recalled when the situation of the party receiving the money has changed in consequence of the payment, and it would be inequitable to allow a recovery." *Id*., 160; *Walker v Conat*, 65 Mich 194, 197-198; 31 NW 786 (1887).

Nevertheless, a party with "full knowledge of the facts," or even merely on notice of the facts and therefore "chargeable with the knowledge," cannot recover voluntarily-paid money by claiming a mistake. *Montgomery Ward & Co v Williams*, 330 Mich 275, 284-285; 47 NW2d 607 (1951); see also *Farm Bureau Mut Ins Co of Michigan v Buckallew*, 471 Mich 940, 940-941; 690 NW2d 93 (2004) ("[p]laintiff had access to all the necessary information, and its error is not excused by its own carelessness or lack of due diligence."). Where a party is not ignorant of the law, the party's rights under the law, and the facts of the party's situation; and where the recipient of the monies has not infringed on the payor's free will by action, inaction, or mere possession of exclusive knowledge; payment will not be considered to have been made under duress. *Beachlawn Corp v St Clair Shores*, 370 Mich 128, 131-133; 121 NW2d 427 (1963).

There is no contention or evidence that the payments plaintiff remitted were because of any "artifice, fraud, or deception on the part of the payee, or duress of the person or goods of the person making the payment." *Pingree*, *supra* at 157. Plaintiff repeatedly emphasizes that the payments were made solely because its tax administration firm made a unilateral mistake, not because of any conduct by defendants. Furthermore, neither party had exclusive knowledge of the applicable law, nor did defendants know anything about plaintiff's factual situation that plaintiff did not also know. Most importantly, it is apparent that the tax administration firm was plaintiff's agent. See *St Clair Intermediate School Dist v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998). "A party is responsible for any action or

inaction by the party or the party's agent." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 224; 600 NW2d 638 (1999). As a consequence, the payments made by plaintiff's tax administration firm are attributable to plaintiff.

We find that plaintiff – through its agent – therefore knowingly remitted the 9-1-1 fees. Moreover, plaintiff did so under "the mistaken factual premise that [plaintiff] was a monthly billing wireless provider instead of a provider that sold prepaid wireless telephones and minutes to customers through retail outlets." In other words, plaintiff asserts that it was under a mistake of fact about *the nature of itself*. But plaintiff must have had full knowledge of the nature of its services at the time it made those payments, and as a consequence, we conclude that its payments were voluntary. See *Farm Bureau Mut Ins Co of Michigan v Buckallew*, *supra* at 940-941. This is not analogous to the case of a person inadvertently putting the decimal point in the wrong place on a check, where that person might indeed pay under a misapprehension of fact as to how much he or she was paying. Plaintiff was aware of all of the material facts – the amount and fact of payment, and the nature of itself – at the time it paid. We therefore agree with defendants that, because plaintiff remitted them voluntarily, plaintiff cannot recover the fees.

We affirm the trial court's holding that providers of prepaid wireless telecommunications services like plaintiff are not required to collect or remit the 9-1-1 fees under the ETSEA. However, we reverse the trial court's award of $231,432.76 in plaintiff's favor. In light of our determinations of those issues, we need not address the issues pertaining to the trial court's award of fees, the statute of limitations, or the notice provisions of the Court of Claims Act.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering